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POSTAL REGULATORY COMMISSION
WASHINGTON, D.C., 20268-0001

MARKET-DOMINANT PRICE CHANGE	)))	R2021-2

COMMENTS OF MPA – THE ASSOCIATION OF MAGAZINE MEDIA AND THE ALLIANCE OF NONPROFIT MAILERS

(June 28, 2021)

MPA -The Association of Magazine Media ("MPA") and the Alliance of Nonprofit Mailers ("ANM") submit these comments in response to Commission Order No. 5905. As the Commission knows, our organizations represent large and loyal Postal Service customers – particularly purchasers of USPS First-Class Mail, Marketing Mail, and Periodicals – and we are active participants in Commission dockets. We would like to place these comments in their proper context, as they are our first in a rate case since the Commission concluded its ten-year review of the market-dominant ratemaking system.

The Commission's final rules in that proceeding authorized the Postal Service to levy above-inflation price increases on market-dominant mailers based on volume declines ("density rate authority") and retirement healthcare and pension prefunding obligations ("retirement authority"), with even more rate authority over noncompensatory products and classes ("noncompensatory authority"). Docket No. RM2017-3, Order No. 5763 (Nov. 30, 2020). On April 6, 2021, the Commission determined that the Postal Service has 4.500 percent density rate authority, 1.062 percent retirement authority, 2 additional percentage points of rate authority available for Periodicals and Package

Services, plus inflation-based rate authority. Docket No. ACR2020, Order No. 5861 (Apr. 6, 2021) at 6.

On May 28, 2021, the Postal Service filed its Notice of Market-Dominant Price Change, triggering the opening of this docket. Under the Commission's new ratemaking system, the Postal Service has approximately 6.8 percent of class-wide pricing authority for compensatory products and approximately 8.8 percent of class-wide pricing authority for noncompensatory classes. Docket No. R2021-2, *United States Postal Service Notice of Market-Dominant Price Change* (May 28, 2021) at 1 ("USPS Notice"). The Postal Service's "Governors have determined to use virtually all of this authority at this time." *Id.*

This rate case is the regrettable, but predictable, culmination of the Postal Service's decade-plus campaign to deregulate the sale of its market-dominant products, and the Commission's acquiescence to that campaign. The USPS Notice contemplates market-dominant price increases that would be larger than any experienced by mailers during the PAEA era by far. And these would be the second market-dominant price increases charged to captive mailers in a span of seven months – deviating from the predictable January price increases that more easily enabled mailers to budget for the coming year. The Commission must not allow the proposed price increases to go into effect: they violate PAEA's statutory requirements and they are inconsistent with numerous statutory objectives and factors that the Commission must consider when issuing its order in this case.

The Proposed Price Changes Are Unlawful and Violate Congress' Statutory Policies As Codified in PAEA

The Commission cannot rubber-stamp these noticed price hikes. It must carefully consider "whether the planned rate adjustments are consistent with applicable statutory policies," *see* 39 C.F.R. § 3030.122(j), and it must not allow the planned rate adjustments to go into effect if they "are found to be inconsistent with applicable law." *Id.* at § 3030.126(i). This means that the Commission "must apply the relevant objectives and factors to individual rate adjustments" such as this one. *Carlson v. PRC*, 938 F.3d 337, 344 (D.C. Cir. 2019). Moreover, the Commission must respond to comments "that can be thought to challenge a fundamental premise" underlying the proposed agency decision in order to comply with the Administrative Procedure Act. *Id.*

We certainly intend to challenge a fundamental premise of the planned rate changes. They violate both the language of PAEA and the statutory policies underlying PAEA. They should be rejected as a matter of law and policy.

Above-CPI Price Increases Remain Illegal

The Postal Service's proposed market-dominant price changes are illegal. They violate the straightforward, unambiguous language that Congress drafted when it enacted PAEA: as a statutory "requirement," "[t]he system for regulating rates and classes for market-dominant products ***shall*** … include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers." 39 U.S.C. § 3622(d)(1)(A) (emphasis added). Class-wide price increases of approximately 6.8 percent above CPI for compensatory market-dominant products and approximately 8.8 percent above CPI for noncompensatory market-dominant products violate the law.

We and other mailer associations, the Commission, and the Postal Service have spilled hundreds of pages' worth of ink addressing this issue, and our respective positions are by now well-worn and before the U.S. Court of Appeals for the D.C. Circuit. *See* Initial Brief of Mailer Petitioners, USCA Case No. 17-1276 (Apr. 13, 2021) at 19-30. We will not reiterate our statutory interpretation arguments here. We will note, however, that the U.S. Supreme Court's decision in *AMG Capital Mgmt. v. FTC* – issued after we and the Postal Service filed our initial briefs with the D.C. Circuit – further supports our position.

In *AMG*, the Supreme Court unanimously held that Section 13(b) of the FTC Act does not authorize the Federal Trade Commission to obtain court-ordered monetary relief, because that type of authority was not explicitly written into the statute. Prior to the *AMG* decision, lower courts had, for decades, agreed with the FTC's expansive view of its authority, notwithstanding the statute's express language. The Supreme Court rejected the FTC's overreach, refusing "to read those words as allowing what they do not say" and reading Section 13(b) "to mean what it says." 141 S.Ct. 1341, 1348-49 (Apr. 22, 2021). We expect the D.C. Circuit to similarly read PAEA Section 3622(d) "to mean what it says" – that a CPI cap is a "requirement" that "shall" be included in the market-dominant ratemaking system, and that interpreting the ten-year review provision as allowing the Commission to eliminate this requirement would be akin to "read[ing] those words as allowing what they do not say."

To Effectuate Congress' Postal Policy, the Commission Must Safeguard Market-Dominant Mailers from Monopoly Abuses

When Congress enacted PAEA, it was keenly aware of the Postal Service's statutorily granted monopoly over the delivery of letters and access to the mailbox.

Congress categorized postal products as either competitive or market-dominant and created a regulatory structure granting the Commission "enhanced review and oversight responsibilities for market-dominant products" in order to safeguard captive customers of the Postal Service's monopoly. *See* S. Rpt. 108-318, at 6-7, 19 (2004) ("in recognition that some customers have no non-Postal Service alternative because of the Congressionally-established restrictions on the carriage of letter outside the mail … this legislation requires that any product subject to this monopoly remain within the market-dominant category."). Shielding mailers against potential abuses of the Postal Service's market power was Congress' expressed policy. The Senate Governmental Affairs Committee Report explains:

> In establishing the postal regulatory structure in the bill, the Committee has attempted to balance the Postal Service's need for additional flexibility with the public and mailing community's need for increased financial transparency *and established safeguards to protect against unreasonable use of the Postal Service's statutorily-granted monopoly.*

Id. (emphasis added).

Congress determined that a price cap on market-dominant price increases was the appropriate mechanism to accomplish its goals. But the Postal Service quickly chafed at any price regulation over the agency's market-dominant products. In regulatory filings, it asserted that "the price cap should be eliminated" and that "the PRC should engage in after-the-fact, light-touch review of Market-Dominant prices we set." *See, e.g.,* United States Postal Service, 2010 Report on Form 10-K, at 7. Throughout the ten-year review, the USPS maintained its skepticism of a price cap system and pressed the Commission for deregulation – euphemistically referred to as "commercial flexibility" and "streamlined monitoring" in various submissions. Docket No. RM2017-3, USPS Comments (Mar. 20, 2017) at 175; *id.* (Mar. 1, 2018) at 48. Even now, despite being granted rate authority of between five- and seven-times inflation, the Postal Service is challenging the Commission's rules in the U.S. Court of Appeals for the D.C. Circuit because the PRC failed to give the USPS *even more* rate authority.

As it has persistently sought near-unfettered pricing authority, the Postal Service has simultaneously insisted that it could be entrusted not to price-gouge its customers. The Postal Service variously identified the "marketplace," "market forces," and "market alternatives" as constraints on its pricing decisions, rendering price controls not only unnecessary, but "redundant and punitive." Docket No. RM2017-3, USPS Comments (Mar. 20, 2017) at 123, 190; USPS Comments (Mar. 1, 2018) at 79; USPS Comments (Feb. 3, 2020) at 4, 65. Indeed, the Postal Service disclaimed any intention to use all of the authority it would be granted: "the mere <u>authorization</u> of additional pricing flexibility by no means suggests that the Postal Service will necessarily <u>use</u> all of the authority it is given." USPS Comments (Mar. 1, 2018) at 79 (emphasis in original). The Commission perpetuated this narrative, touting the fact that "the Postal Service retains discretion not to use all of the rate authority provided by the final rules." Docket No. RM2017-3, Order No. 5763 (Nov. 30, 2020) at 313. Giving the Postal Service more rate authority, reasoned the Commission, would be beneficial because it would allow the USPS "to use its business judgment to smooth out rate adjustments." *Id.* at 314.

The Postal Service is *still* parroting this fiction. In its recently published ten-year strategic plan, the Postal Service declared that it will apply "judicious and prudent" market-dominant pricing strategies. USPS, *Delivering For America* (May 23, 2021) at 38. Only days later, the Postal Service filed the instant Notice of Price Change and explained that this rate case is an integral part of the ten-year plan that promised a "judicious" pricing strategy. USPS Notice, at 1. Apparently, a "judicious" pricing strategy means "charging our captive customers the maximum possible."

Free from competitive constraints or stringent regulation, a monopolist's incentives are to raise price and reduce output or quality. Consider this: the Postal Service's productivity has declined in each of the past five years. USPS FY2020 Annual Report to Congress (May 14, 2021) at 53. It failed to meet all of its service performance targets in FY2020. Id. at 35. It has proposed to further degrade service performance standards for market dominant products. *See generally* PRC Docket No. N2021-1 (opened Mar. 23, 2021). And yet it has elected to utilize all of the supplemental pricing authority given to it by the Commission, despite both its and the Commission's assurances that the Postal Service could use its "discretion" or "business judgment" not to use all of the rate authority provided by the Commission's final rules. *See, e.g.*, Order 5763 (Nov. 30, 2020) at 313-14.

The Proposed Maximum-Authority Price Increases Violate Statutory Policies

The Postal Service's actions violate PAEA's policies, which codify Congress' desire to protect mailers from the very type of monopoly abuse seen here. The massive above-CPI price increases proposed by the Postal Service violate the statutory objective of achieving just and reasonable rates. 39 U.S.C. § 3622(b)(8). And providing the Postal Service with unprecedented levels of pricing power will weaken, not "maximize," incentives to reduce costs and increase efficiency. *Id.* at (b)(1).

As mentioned above, the Postal Service shifted its usual January implementation timeline for rate changes to August for 2021. "The Governors have not yet determined whether this timeline shift will apply to future years," USPS Notice at 1, leaving mailers in the dark and adding uncertainty to the budgeting process. This not only violates the Commission's regulations requiring a schedule for regular and predictable rate adjustments – which the Postal Service has declared by fiat is not implicated here (*see* USPS Notice at n.2) – but it also undermines the statutory objective of a rate system that achieves predictability and stability in rates. 39 U.S.C. § 3622(b)(2).

Moreover, the Postal Service generally made presort discounts as low as possible while still complying with the Commission's new rules. The Postal Service applauds itself for raising Periodicals workshare discounts that had previously fallen well-below 100 percent and "bringing them into compliance with 39 C.F.R. § 3030.284." USPS Notice, at 22. But these new discounts barely meet the PRC's new workshare requirements – either raising the existing discount by 20 percent or setting the passthrough at 85 percent – and they are still well below their corresponding avoided costs. For example, the key Periodicals Outside County Carrier Route Basic passthrough is now 85.9 percent, and most other Periodicals discounts are similarly barely above the 85 percent minimum. Of the eighteen Periodicals Outside County rate elements listed in Table 16 of the USPS Notice, sixteen are under 87 percent. *Id.* at 23. A careful analysis of the proposed rate changes beneath the class level also reveals that, within Marketing Mail, huge price increases—as much as 26 percent for nonprofit flats and 14 percent for commercial flats—will be levied on highly-efficient, High Density Carrier Route mail entered at the Sectional Center Facility (SCF).[1] These price

[1] *See* USPS-LR-R2021-2/2, CAPCALC-USPSMM-R2021-2-Rev-6-21-21.xlsx, "HD&Saturation Flats and Parcels", cells H15 and H6.

increases will disincentivize co-mailing, a practice that substantially reduces Postal Service costs. These pricing and discount proposals are inconsistent with the key statutory policy of maximizing incentives to increase efficiency. 39 U.S.C. § 3622(b)(1). They also fail to factor in "the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs into the Postal Service." 39 U.S.C. § 3622(c)(5). The Postal Service should be encouraging highly efficient mail practices like these, rather than penalizing them with massive rate increases.

When the Commission gives the Postal Service any leeway at all, the Postal Service will take advantage of this largesse with respect to rates (charging its customers the maximum possible) and with respect to discounts designed to encourage efficient mail preparation (in which case it will provide the minimum allowable). Simply put, the Commission cannot trust the Postal Service to exercise discretion, prudence, or judicious business judgment. The Commission's function as regulator is to implement Congress' policies – doing so here requires rejection of the proposed price increases.

Conclusion

We have for years urged the Commission in rate cases to require more efficient pricing decisions from the Postal Service. We continue to do so here. However, because the Commission's final rules in the ten-year review proceeding have granted the Postal Service significant above-CPI pricing authority, the stakes are far higher now. The Commission must reject the Postal Service's proposed rate increases: they are unlawful, they are inconsistent with PAEA's objectives, and they are neither judicious nor prudent. The Postal Service has shown that if the Commission gives it an inch, the

Postal Service will take a mile. As regulator, the Commission must safeguard mailers from this abuse of market power.

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